United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-1287

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To be argued by
PAUL F. CORCORAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1287

UNITED STATES OF AMERICA,
Appellee,

—against—

MANUEL RODRIGUEZ, a/k/a MANOLO RODRIGUEZ,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
Assistant United States Attorney,
Of Counsel.

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Preliminary Statement

Manuel Rodriguez appeals from a judgment of the United States District Court for the Eastern District of New York, entered July 18, 175, convicting him, after a trial before the Honorable Thomas C. Platt and a jury, of four counts of harboring illegal aliens in violation of Title 8, United States Code, Section 1324(a)(3).* Upon conviction, defendant was sentenced to a prison term of four years on each count, to run concurrently, and to a fine of Four Thousand Dollars. Execution of sentence was stayed pending appeal.

On appeal, appellant challenges the District Court's rulings regarding: (1) the sufficiency of the evidence before the Grand Jury; (2) the admissibility of evidence

* Indictment 75 Cr. 112 charged appellant with twelve counts of harboring illegal aliens. Count eight was subsequently dismissed on motion of the Government at the close of its case. The jury found appellant guilty on Counts 1, 2, 3 and 6, and acquitted him of the balance.

by and about illegal aliens arrested on appellant's premises on February 12, 1975; (3) denial of appellant's requests to charge (4) constitutionally of Section 1324(a)(3); and (5) the severity of appellant's sentence.

Statement of Facts

On February 12, 1975, two four-man teams of Immigration and Naturalization Service agents (hereinafter I.N.S. agents) commenced a joint investigatory operation which had as its purpose the detection and apprehension of illegal aliens reportedly residing at premises known as 18 Bunting Lane and 113 Brittle Lane, Levittown, New York (S.H. 3/21/75 pp. 21, 41; S.H. 3/25/75 pp. 142, 175).* The predicate for the investigation was information received from two unproven sources as to the presence of illegal aliens at these addresses. A preliminary check of the records of the Nassau County Clerk revealed that the appellant, Manuel Rodriguez, owned both houses.

At approximately 7:00 A.M., Neil Jacobs, accompanied by three fellow agents, Lupa, Galpin and Alexandro, arrived in the vicinity of 18 Bunting Lane, Levittown, New York. Simultaneously, four other I.N.S. agents, Wright, Donovich, Kominsky and Pappas, began a similar investigation at another residence located at 113 Brittle Lane, Levittown, New York.

Upon arriving in the vicinity of 18 Bunting Lane, Jacobs immediately observed a male of hispanic appearance seated in an "old car" which was parked directly in front of the suspect house. Approaching the man, who was subsequently identified as Jorge Galaes, an ille-

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* The record of the suppression hearing not being paginated consecutively, references to the suppression hearing will be referred to as S.H., followed by the date and page. References to the trial transcript will be denoted Tr.

gal alien from El Salvador, Jacobs identified himself as an I.N.S. agent and inquired as to Galaes's alienage and deportability (S.H. 3/21/75 pp. 11-12). Galaes stated that "he was from El Salvador, entered the United States in 1969, and he told me he had come in with a passport." (*Id*). Jacobs then asked Galaes if he had his passport; Galaes answered affirmatively, indicating that his passport was inside the house known as 18 Bunting Lane. Jacobs requested that Galaes obtain his passport, and he and his fellow agents accompanied Galaes into the house to get it (S.H. 3/25/75, p. 125).* While Galaes had not yet been placed under arrest (*Id.*), Jacobs testified that he believed Galaes to be an illegal alien and would not have permitted him to enter the house alone (S.H. 3/25/75 p. 125). Galaes did not object to Jacob's accompanying him into the house. (*Id.*).

Upon entering the house with Galaes, Jacobs immediately encountered a second individual, Alba Rivas, who was in the kitchen making coffee. After identifying himself again and inquiring as to Rivas' alienage and deportability, Jacobs determined that Rivas too was an illegal alien and placed she and Galaes under arrest (SH. 3/21/75 p. 13). He then accompanied Rivas to her first floor bedroom to obtain her passport, where another individual, Jose Cabalero, was found (*Id.* at 14-15). Upon questioning, he also proved to be an illegal alien. (*Id.*). At that point, Jacobs and his fellow agents sought out any additional illegal aliens who might be in the house by knocking on the locked doors of some seven or eight makeshift bedrooms. A total of nine illegal aliens were discovered at 18 Bunting Lane.* Indeed all the persons found at 18 Bunting Lane were illegal aliens.

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* Jacobs testified that securing the alien's passport is the "basic" thing they have to do, since "it is difficult to move a person out of the country without a passport" (S.H. 3/24/75 p. 17).

** Another illegal alien, who arrived by car while agents were on the premises, was not the subject of a harboring charge against appellant.

The investigation at 113 Brittle Lane had similar results. Agents Wright, Kaminsky, Donovich and Pappas began surveillance of the house at approximately 7:00 A.M. About thirty-five minutes later, a man and a woman of hispanic appearance left the house and approached a car parked in the driveway. Having previous information that there were illegal aliens on the premises, agents Donovich and Pappas questioned the man and woman, Mr. and Mrs. Ortiz, as to alienage and deportability. They learned that Mr. Ortiz was a citizen of the United States from Puerto Rico, while his wife was an illegal alien from El Salvador (SH. 3/25/75 pp. 134-135). Mr. Ortiz then invited the agents into the house and produced papers on behalf of his wife which had been filed with I.N.S. (*Id.*).* On inquiry, Ortiz then informed the agents that there were three illegal aliens living in the house and gave the agents permission to search (S.H. 3/25/75 at p. 135). The resulting search did produce three illegal aliens.

After their arrests, the twelve illegal aliens seized at appellant's premises were transported to Immigration Headquarters, 20 West Broadway, New York, New York, where they were interviewed. *Miranda* warnings were administered and statements were taken which evidenced, for the first time, knowledge on the part of the owner of the premises, Manuel Rodriguez, that the aliens he was sheltering and lodging were illegally in this country. Evidence of potential harboring charges was then presented to the United States Attorney's Office (S.H. 3/24/75 p. 3).

Because of the nature of the harboring charge—the evidentiary need to retain the aliens as incarcerated ma-

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* Mrs. Ortiz was not arrested since it is not the policy of I.N.S. to arrest aliens who are under proceedings or have a previous petition pending with I.N.S. (S.H. 3/25/75 p. 155).

terial witnesses until trial—the matter was expeditiously presented to a grand jury sitting in the Eastern District of New York, which promptly returned an indictment on February 13, 1975, charging appellant with twelve counts of harboring aliens in violation of Title 8, United States Code, Section 1324(a)(3).

Suppression Hearing

Appellant moved to suppress any testimony by or about the aliens arrested on his premises on February 12, 1975. At the pre-trial suppression hearing, agents Jacobs, Pappas and Donovich and their supervisor James Rowland testified about the squence of events leading to the February 12th investigation, and the circumstances surrounding the arrest of the aliens.

Jacobs testified that on July 23, 1975, some seven months prior to the February 1975 investigation, the I.N.S. had obtained information from an illegal alien, one Ortilia Vilatoro, that she had lived both at 113 Brittle Lane and at 18 Bunting Lane, Levittown, New York. In giving her background information, Vilatoro mentioned the name Manuel Rodriguez as the owner of the house and suggested that there were "two or three other possible illegal aliens" living there (S.H. 3/21/75 p. 34-35). No investigation was conducted at that time, however, since this was merely one of "thousands of pieces of information that just came up" (S.H. 3/21/75 p. 31). In January of 1975, a month prior to the investigation, Jacobs had received further information from one Ernesto Lopez, who had himself previously pled guilty to harboring aliens,* that one "Manolo Martinez" had illegal aliens at the subject premises (S.H. 3/24/75 p. 7). Jacobs noted that Lopez did not claim his information to be based on personal knowledge (S.H. 3/25/75 p. 123). Nor

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* See *United States* v. *Lopez*, Slip Op. No. 861, decided by this Court on June 26, 1975.

was Jacobs sure whether "Manolo Martinez" and the Manuel Rodriguez mentioned six months earlier by Vilatoro, were "the same person or a different person" (S.H. 3/24/75 p. 7). Though a check of the records of the Nassau County Clerk's Office revealed that the houses in question did belong to Manuel Rodriguez, Jacobs testified that prior to going out to 18 Bunting Lane on the morning of February 12, 1975, he did not believe he had evidence sufficient to establish probable cause for a warrant (S.H. 3/24/75 p. 83-84).

On the basis of the undisputed testimony of the agents concerning the purpose of the February 12th investigation, and the events occurring at 18 Bunting Lane early that morning, Judge Platt denied appellant's motion to suppress testimony by or about the illegal aliens arrested, finding:

> "It seems clear to me under 8 U.S.C., Section 1357 (a-1) that the officers or employees of the Immigration and Naturalization Service have the power without warrant to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States. . .
>
> In the case at bar the first event that appears to have happened in point of time was Mr. Jacobs' interrogation of an alien in the automobile parked on the street in front of Bunting Lane or the house on Bunting Lane. He certainly had under the section of the statute the authority to go up and interrogate that alien. During that interrogation I find that he determined that such person was an illegal alien.
>
> At that point it seems to me that he had probable cause to arrest that alien and to accompany him to attain whatever he chose to obtain from the dwelling in which he was living, which he

claimed he lived in and where he said his passport substantiating certain of his claims existed. After that it seems to me it all follows quite logically that once inside he saw another person who looked like an alien and he had authority to interrogate that alien and that from there arose probable cause to arrest that alien and so forth with respect to each succeeding alien.

I also find that I think that the government had reasonable suspicion to make the first interrogation of the alien in the car and may well have even had the right to arrest and detain at least temporarily the alien in the car and possibly one more person in the building based on such reasonable suspicion under the authority, although I do not think it is necessary that such suspicion exist" (S.H. 3/25/75 pp. 212-214).*

Trial

Appellant stipulated that on February 12, 1975 he was the owner of record of the two single-family Levittown houses in question. The remaining facts were established by the undisputed testimony of eleven of the twelve aliens arrested at appellant's houses, as well as by the testimony of agent Jacobs.

On February 12, 1975, twelve illegal aliens were residing in appellant's two single-family suburban houses. Many slept in seven (7) foot square cubicles in a partitioned attic and garage. Each alien paid appellant Fifteen Dollars ($15.00) per week for these lodgings (Tr. pp. 16,

* Judge Platt also found the arrests at 113 Brittle Lane to be lawful (S.H. 3/25/75 pp. 214-216). In view of appellant's position that those arrests are "moot" by virtue of the acquitals relating thereto, the Court's reasoning thereon will not be considered here.

31, 49, 63, 98, 109, 125, 147). Their stays varied from a few months to several years. Most of the illegal aliens arrived at Rodriguez' houses immediately after their illegal border crossings, having brought Rodriguez' addresses with them from El Salvador, Central America (Tr. pp. 28-30, 48-49, 62, 71-73, 88, 108, 146).

At least two of the illegal aliens, Jose Portillo and Alba Rivas, testified as to conversations had with appellant during which they told him they were illegally in this country (Tr. pp. 19, 148). A third, Jose Caballero, testified that appellant "had to know" he was illegally in the country (Tr. p. 38). Regardless of their status, none of the illegal aliens were ever requested by appellant to leave his premises.

POINT I

The District Court properly denied appellant's motion to dismiss the indictment.

Appellant initially challenges the sufficiency of the indictment. Apparently concluding from the Jencks Act materials received at trial, that only two of the twelve aliens arrested were presented to the grand jury, appellant argues that the evidence before that body concerning appellant's knowledge of the illegal status of the remaining ten aliens must have been insufficient. Significantly, appellant does not allege that the indictment was insufficient on its face.

The District Court properly denied appellant's motion to dismiss the indictment. A grand jury, just as the petit jury which must ultimately serve as trier of the facts, may base its determination wholly upon circumstantial evidence. *Direct evidence* as to knowledge on the part of appellant was certainly not a prerequisite to indictment.

More importantly, however, in challenging the indictment, appellant overlooks the well established principle that an indictment, valid on its fact, is not subject to challenge for insufficiency. *See Costello* v. *United States*, 350 U.S. 361, 363 (1956) where Mr. Justice Black noted:

> "If indictment were to be held open to challenge on the ground that there was inadequate and incompetent evidence before the grand jury, the resulting delay would be great indeed . . . An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, it enough to call for trial of the charge on the merits."

See also, *United States* v. *Crisona*, 271 F. Supp. 150 (S.D.N.Y. 1967), affirmed 416 F.2d 107 (2d Cir. 1969).

POINT II

The District Court properly denied appellant's motion to suppress testimony by or about the illegal aliens arrested on February 12, 1975.

Appellant maintains that he was the "target" of a harboring investigation, and challenges the District Court's denial of his motion to suppress testimony by or about the illegal aliens arrested at 18 Bunting Lane on February 12, 1975. The warrantless entry of that premises was, appellant contends, a well planned "hit" aimed at gathering evidence that he was harboring illegal aliens. Such a warrantless entry allegedly violated his Fourth Amendment right against unreasonable search and seizures. Citing *United States* v. *Brigoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974) [since affirmed — U.S. —, 17 Cr. L. 3180, decided June 30, 1975] and *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), appellant argues that the exclusionary rule should have been invoked

to exclude evidence so gathered in violation of his Fourth Amendment rights. The facts established in the District Court belie appellant's claim.

Rejecting appellant's claim, the District Court found that he was not a "target" of the February 12, 1975 investigation (S.H. 3/25/75 at p. 211). Rather, the Court found that the agents purpose was "to go out and make an investigation to determine if there were any illegal aliens on the two premises." Id. The District Court expressed "[sincere] doubt whether Mr. Rodriguez per se was the target at that point . . ." Nor could the Court find evidence to substantiate his "target" status until "the afternoon of February 12, 1975, after the interrogation [of the aliens] took place" (S.H. 3/25/75 p. 211-212). This finding is well supported by the record.

That appellant was not the target of a criminal investigation on the morning of February 12, 1975 was clear from the undisputed suppression hearing testimony of agents Jacobs, Pappas and Donovich. Jacobs and Donovich repeatedly testified that their only purpose in going to 18 Bunting Lane was to apprehend illegal aliens in order to place them under deportation proceedings (S.H. 3/21/75 pp. 21, 41; S.H. 3/25/75 p. 175).*

Having thus commenced the investigation for a legitimate purpose,** the only question then is whether the agents thereafter acted reasonably and lawfully.

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* Appellant seeks support for his contention that he was "target" of a harboring charge in the fact that agent Jacobs was the case agent in the *Lopez* case. It should be noted that in *Lopez*, where a criminal harboring case was the purpose for the entry of Lopez' houses, Jacobs first sought and obtained search warrants from the Eastern District of New York. See *United States* v. *Lopez*, Slip Op. No. 861, 2d Cir., decided June 26, 1975.

** It can only be assumed that appellant's strenuous attempt to establish that he was the 'target' of a criminal investigation

[Footnote continued on following page]

As applicable here, Section 1357 of Title 8, United States Code enpowers agents of the I.N.S., without warrant, (1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States; and (2) to arrest any alien in the United States, if [the agent] has reason to believe that the alien so arrested is in the United States in violation of any . . . law or regulation and is likely to escape before a warrant can be obtained . . ." (Title 8, United States Code, Section 1357(a)(1) and (2)).*

On February 12, 1975, acting on information which amounted to "reasonable suspicion" to believe aliens were

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arises from his visceral realization that otherwise, the actions of the I.N.S. agents on February 12, 1975 were in furtherance of their lawful authority to detect and arrest illegal aliens (Title 8, United States Code, Section 1357(a)(1)and (2)). That authority is primarily administrative in nature (*See Almedia-Sanchez* v. *United States*, 413 U.S. 266 (1973), where Mr. Justice Powell in his concurring opinion, relied upon two administrative search cases. *Camara* v. *Municiple Court*, 387 U.S. 523 (1967) and *See* v. *City of Seattle*, 387 U.S. 591 (1967), in support of the proposition that area-wide search warrants based upon a lesser standard of probable cause might be the appropriate constitutional vehicle to conduct these administrative searches for illegal aliens. Clearly, Government agents may not circumvent constitutional safeguards by the abusive use of administrative powers to gather evidence of criminal offenses. *United States* v. *Abel*, 362 U.S. 217 (1960). But such was not the case here, where, as Judge Platt found, the purpose of the agents was the arrest and deportation of illegal aliens. The derivative harboring charge was considered and presented to the United States Attorney's Office only after the arrest and interrogation of the illegal aliens.

* The recent Supreme Court application of Fourth Amendment restrictions in the exercise of Section 1357 powers was made in full recognition of the serious nature of our national alien problem. *See United States* v. *Brigoni-Ponce* — U.S. —, 17 Cr. L. 3180 (June 30, 1975); *United States* v. *Ortiz*, — U.S. —, 17 Cr. L. 3178 (June 30, 1975). While I.N.S. agents are held to the well-established probable cause standards for searches and seizures, *see also Almedia-Sanchez* v. *United States*, 413 U.S. 266 (1973), they are still allowed broad investigatory powers based on a "reasonable suspicion" standard.

present at 18 Bunting Lane, the agents set out to investigate. Their only prior plan was to "sit on the house" and make "observations" (S.H. 3/21/75 p. 36). On arrival in the vicinity, however, circumstances developed unexpectedly. As Jacobs testified, there was already an individual, Jorge Galaes, sitting in an "old car" in front of 18 Bunting Lane when they arrived. Though they "assumed" he came from the suspect house, no one had seen him leaving it (*Id.*). As noted above, Galaes was Hispanic in appearance, and his proximity to the subject premises gave Jacobs "reasonable suspicions" * to believe Galaes might be an illegal alien. Accordingly, Jacobs approached and interrogated him. Believing him to be an alien subject

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* In *United States* v. *Brigoni-Ponce*, — U.S. —, 17 Cr. L. 3180, 3184, decided June 30, 1975, the Supreme Court, Justice Powell writing for the majority, "limit[ed] exercise of the authority granted by" 8 United States Code, Section 1357(a)(1) by prohibiting "stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens." Thereafter the Court set forth factors to be considered in deciding whether there is "reasonable suspicion" of alienage. Officers may consider characteristics of the area of encounter, including proximity to border; information of recent illegal entries; the suspects conduct and mode of appearance, including apparent ancestry, mode of dress and haircut; and the type of vehicle involved, if any. In short, the Court concluded that "[i]n all situations the office is entitled to access the facts in light of his experience detecting illegal entry . . ." *United States* v. *Brigoni-Ponce*, *supra* at 3184. That which constitutes 'reasonable suspicion' has been twice considered by this Court in recent months. See *United States* v. *Salter*, 2d Cir. Slip Op. No. 1253, decided August 15, 1975; and *Ojena-Vinales* v. *Immigration and Naturalization Service*, 2d Cir. Slip Op. No. 1052, decided September 23, 1975. In the instant case agent Jacobs was clearly operating with "reasonable suspicion" when he approached Galaes. Not only was Galaes of hispanic appearance, which though insufficient alone is a factor to be considered, he was sitting in an "old car", the type of car Jacobs, based upon his experience, would expect an alien to be driving. (S.H. 3/24/75 p. 15). Moreover, Jacobs had information from two sources that there were illegal aliens in the house in front of which Galaes was parked.

to arrest and deportation, Jacobs asked him to get his passport (S.H. 3/21/75 p. 43).* Together with one or more fellow agents, Jacobs accompanied the illegal alien into the premises to get his passport, where they encountered another illegal alien, Alba Rivas, in plain view. The third alien, Caballero was detected when agent Jacobs escorted Rivas to her room to get her passport. Thereafter, to protect themselves, and to determine whether there were additional illegal aliens present, agents conducted a limited search of the house.

As Judge Platt noted, the questioning of Jorge Galaes was clearly lawful. *United States* v. *Brigoni-Ponce, supra,* — U.S. — (1975). Agent Jacobs, then having reason to believe Galaes an illegal alien, was justified in requesting Galaes' passport both to substantiate his claims and to allow prompt deportation, if applicable. Since he could not reasonably permit the suspected illegal aliens to enter the house alone; his entry with Galaes to obtain his passport was both reasonable and good police work. (See *United States* v. *Morell,* 2d Cir. Slip Op. No. 1217, decided August 29, 1975). His subsequent encounter of Rivas and Caballero was fortuitous,** and his inquiries concerning their alienage and deportability was at that time, based upon "reasonable suspicion", if not "probable cause", to believe that they too were illegal aliens. Jacobs entry into the premises with Galaes was therefore for a legitimate purpose, and that which transpired thereafter followed logically. (S.H. 3/25/75 pp. 212-214).

More significantly, however, the encounter with Galaes in front of 18 Bunting Lane itself made the agents subsequent actions both reasonable and lawful. Though their earlier information, being stale and hearsay, did

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* Again, the procedure of obtaining an aliens passport was characterized as "basic", the passport being necessary to prompt deportation (S.H. 3/24/75 p. 17).

** Jacobs testified that had he not encountered Rivas on entering the house, he did not know whether he would have searched further.

not amount to probable cause to believe there were illegal aliens present at 18 Bunting Lane, the actual discovery of an illegal alien at that very address clearly raised the otherwise deficient information to the level of probable cause. *United States* v. *Ventresca*, 380 U.S. 102 (1965); *United States* v. *Draper*, 358 U.S. 307 (1959); *United States* v. *Burke*, 2d Cir. Slip Op. 888, decided May 15, 1975.*

Having established probable cause, the question then is whether the Fourth Amendment required the I.N.S. agents to attempt to secure the premises in hopes of obtaining a warrant, or alternatively permitted them to act swiftly in the exercise of their lawful authority.

The Fourth Amendment's warrant requirement is a practical one, in both arrest and search situations. Even where the probable cause is to effect a search for evidence, the Courts have refused to apply a stringent warrant requirement when to do so would frustrate the purpose of the search. See *Almedia-Sanchez* v. *United States*, 413 U.S. 266, (1973); *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Brinegar* v. *United States*, 338 U.S. 160 (1949).

Under the circumstances here present, it would not have been practical for the agents to attempt to secure a warrant, either search or arrest. At the time they encountered Galaes in front of the house, there were four agents present. To get a warrant would necessitate the removal of at least two of those agents—one to actually obtain the warrant and the other to take charge of

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* As Judge Friendly recently noted in *United States* v. *Burke*, *supra*, probable cause is a "visceral concept". It does not require proof that a crime actually occurred, only that it may have occurred. Probable cause is "practical and not abstract", and its requirements must be "tested and interpreted by the Court in a common sense and realistic fashion." *United States* v. *Ventresca*, 380 U.S. 102 (1965).

Galaes. Only two agents would have remained to "secure" a premises, which contained an unknown quantity of "inherently mobile" human beings. Such an alternative would be neither practical nor reasonable. Accordingly the Fourth Amendment warrant requirement gave way to the exigent circumstances which developed, and the agents lawfully entered 18 Bunting Lane to arrest the aliens.*

Finally, there is no suggestion by appellant, nor could there be on this record, that the I.N.S. agents extended their search of 18 Bunting Lane beyond the intrusion necessary to find bodies. Indeed, rather than a traditional search, the record indicates the agents merely knocked on the doors of the cubicles located in this "motel-type" or

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* The Fourth Amendment warrant requirement is less stringently applied when entry of a premises is made to arrest rather than to search. While warrantless entry of a premises to search is "*per se* unreasonable" subject only to a "few specifically established and well-delineated exceptions" which are "jealously and carefully drawn" *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454 (1971); *Vale* v. *Louisiana*, 399 U.S. 30 (1970), a warrantless entry to effect a lawful arrest has suffered little criticism, and that only where the search follows a forceful nighttime entry. *See United States* v. *Hofman*, 488 F.2d 287, 289 (5th Cir. 1974); *Dorman* v. *United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970); *United States* v. *Botsch*, 364 F.2d 542 (2d Cir. 1966). *But see United States* v. *Watson*, 504 F.2d 849 (9th Cir. 1974) wherein the North Circuit recently overturned a conviction because the police, having had probable cause for six days, entered defendants' premises without a warrant to effect arrest.

Whether the instant entry to 18 Bunting Lane can be categorized as an entry to search or to arrest is conceptually difficult since the purpose was to seek out bodies, lawfully subject to arrest, which the agents had probable cause to believe inside. Since "the exigence of the situation made the [agents' entry] imperative" however, *Warden* v. *Hayden*, 387 U.S. 294, 298 (1967); *McDonald* v. *United States*, 335 U.S. 451, 456 (1918), the distinction need not be drawn here. The instant case falls under the "exigent circumstances" exception to the Fourth Amendment's warrant requirement.

"boarding house" type multiple-dwelling. (S.H. 3/25/75 pp. 178, 181). The agents testified that their purpose in making such a limited search was twofold, to protect themselves and to determine if there were any additional illegal aliens on the premises. (S.H. 3/24/75 p. 72-73).

Appellant's suppression motion was therefore properly denied.

POINT III

The District Court charged the proper definition of "harboring" under Section 1324(a)(3).

Appellant next alleges error in the District Court's failure to charge the definition of "harboring" requested by defense counsel. The requested charge would have required a jury finding that appellant had "surreptitiously" or "clandestinely" sheltered, succored or protected aliens not lawfully entitled to reside in the United States. Citing *United States* v. *Mack*, 112 F.2d 290 (2d Cir. 1940); *Susnjar* v. *United States*, 27 F.2d 223 (6th Cir. 1928). The Court chose instead to charge the Webster's Dictionary definition of "harbor" which had been previously cited with approval in *Herrera* v. *United States*, 208 F.2d 215 (9th Cir. 1953), *cert. denied*, 347 U.S. 927 (1954):

> "The definition of harboring is defined by Webster's New International Dictionary, Second Edition, Unabridged, as 'To afford lodging to, to entertain as a guest, to shelter, to receive or give refuge to, now usually with reference to evil, especially unlawful act or intent."

(Tr. p. 307-308).

We respectfully submit that the District Court properly charged the jury that the term "harbor", as used in

Section 1324(a)(3), may mean to "to give shelter or refuge to." Indeed, the Webster's dictionary definition charged by Judge Platt has been since approved by this Court in *United States* v. *Lopez*, Slip Op. No. 861, decided June 26, 1975. The *Lopez* opinion in fact rejected the very argument appellant here raises.* In construing the Section 1324(a)(3) term "harbor" to prohibit "conduct tending substantially to facilitate an alien's remaining in the United States illegally", Slip Op. at 4434, this Court made clear that one who substantially facilitates the remaining of illegal aliens by openly providing the sheltering and lodging so necessary to that remaining, would be in violation of the statute. It is not necessary, as appellant suggests, that the provision of shelter or lodging be "clandestine" or "surreptitious".

Appellant's contention that the District Court committed reversible error in failing to charge the definition of "harboring" as set forth in *Lopez*, is similarly without merit. Since the Rodriguez trial preceded the Lopez opinion by some three months, the District Court's charge herein could hardly be expected to trace the language of a subsequent opinion. And, since the *Lopez* opinion upheld Judge Platt's definition of "harboring",** the net effect is the same. The charge herein did, in effect, call for a jury finding of conduct tending substantially to

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* The definition of "harbor" set forth in *Susnjar* v. *United States*, 27 F.2d 223 (6th Cir. 1928), and relied upon by appellant in support of his "clandestine" argument, was recognized by this Court to have been tacitly rejected by the Supreme Court in *United States* v. *Evans*, 333 U.S. 483 (1948). *United States* v. *Lopez, supra*, Slip op. at 4433 n. 3. Such a limiting construction would further be at odds with the statutory scheme and the legislative history thereof (*Id.*).

** Judge Platt, as trial judge in *United States* v. *Lopez, supra*, had adopted the same definition of "harboring" during that trial.

facilitate the remaining of illegal aliens. Judge Platt appropriately defined "harboring" as the giving of shelter, lodging or refuge "with reference to evil, especially unlawful act or intent" (Tr. p. 308). Thereafter, he instructed the jury that this prohibited provision of shelter and lodging to illegal aliens must be "knowing" or "wilful". These terms were then defined as follows:

> "An act is done knowingly if done voluntarily and not because of mistake or accident or other innocent reasons. The purpose of adding the work "knowingly" to the statute was to insure that no one would be convicted for an act done because of mistake or accident or other innocent reasons.
>
> You remember the language is "knowingly or wilfully harbor." An act is done wilfully if done voluntarily and intentionally and with the specific intent to do something that the law forbids; that is to say, with bad purpose either to disobey or disregard the law."

(Tr. p. 308).*

Since shelter or lodging is an essential prequisite to one's remaining anywhere, the provision of the essential shelter or lodging to an illegal alien, knowingly and wilfully, as defined in Judge Platt's charge, would clearly constitute "conduct tending substantially to facilitate" the recipient's illegal remaining in the United States.

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* Appellant's allegation that the Court failed to charge his requests as to "wilfully" and "knowingly" is curious in light of the above quoted language wherein the Court gave the very charges appellant requested.

Nor was the jury here without sufficient evidence upon which it could find such proscribed conduct.* The evidence established that like Lopez, the appellant herein operated "havens for aliens who had illegally entered the United States", *United States* v. *Lopez*, Slip Op. 861 at 4430. As in *Lopez*, each alien paid Rodriguez fifteen dollars ($15.00) per week "for use of these refuges as living quarters" (Tr. pp. 16, 31, 49, 63, 98, 109, 125, 147)** (*id*). And the similarity did not there end; many of the aliens arrested in Rodriguez' houses testified that they entered this country with Rodriguez' addresses, travelling directly to Rodriguez' houses from their illegal border crossings (Tr. pp. 28-30, 48-49, 62, 71-73, 88, 108, 146).***

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* Interestingly, the appellant does not challenge the sufficiency of evidence at trial as to his knowledge of the illegal status of the aliens he was harboring. (*Compare* Point I of Appellant's brief where he argues insufficiency before the grand jury). Indeed at trial, when the Government attempted to dismiss Count Eight for insufficiency—the alien, Bertha Vilatoro, having been ill and not having testified—appellant's counsel objected, arguing that a circumstantial case had been made out with regard to the absent alien, "sustained by all the other evidence in the case" (Tr. pp. 210-211). It should be noted, however, that the testimony of the aliens who were the subjects of the four harboring counts on which appellant was convicted contained stronger, more direct evidence of knowledge of illegality. Jose Portillo (Count I) and Alba Rivas (Count VI) testified that they actually told appellant they were illegally in this country (Tr. pp. 19, 148). Jose Caballero (Count II) testified that Rodriguez "had to know" he was an illegal alien (Tr. p. 38).

** Indeed, at least one of the aliens, Jorge Galaes, testified that he had previously found shelter at 77 Old Farm Road, a house belonging to Ernesto Lopez.

*** Appellant would rely on the fact that he provided fewer services to the aliens than did Lopez: he argues that he did not find jobs for them or transport them to work; nor did he arrange sham marriage for them. That Rodriguez was less culpable than Lopez is not in issue. He did provide the shelter and lodging so necessary to these illegal aliens remaining. As such, he was in violation of the statute as construed in *Lopez*. The reference by the *Lopez* Court to the providing of jobs and arranging of show marriages merely tended to diminish Lopez' contention of innocent involvement.

Of the fourteen people found residing in Rodriguez' two single-family suburban homes on February 12, 1975, twelve were illegal aliens; and the evidence permitted the inference that many others had preceded them.*

POINT IV

The District Court properly upheld the constitutionality of Section 1324(a)(3).

Appellant next argues that Section 1324(a)(3) is unconstitutionally vague, uncertain, and overboard, and is violative of the equal protection clause. This court having previously considered and rejected each of these allegations in *United States* v. *Lopez*, *supra*, Slip Op. No. 861, decided June 26, 1975, and our research having revealed no contrary authority in the intervening months, the Government respectfully relies upon the *Lopez* opinion.

POINT V

Appellant's sentence was properly within the bounds of the District Court's discretion.

Finally, appellant attacks his sentence as excessive. Arguing that his sentence to four years imprisonment was "unfair" and merely the result of "the national concern with the illegal alien problem," appellant seeks to have

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* Not only did many of the aliens testify that they knew of the availability of shelter and lodging at Rodriguez' houses before they entered this country, thus justifying the inference that others who had been here before them had sent back word, Alba Rivas testified that she had lived in Rodriguez' house since 1972, and that eight to ten people lived there at all times (Tr. p. 147). Since most of the illegal aliens arrested on February 12, 1975, had only been in this country a few months, a high turnover in illegal aliens is inferentially established.

his sentence modified by reduction to a probationary period.

While appellant's arguments might properly be made before the District Court on a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, they are not properly raised on this appeal. Appellant does not contend that the sentencing court was misinformed or otherwise misled as to appellant's prior criminal record, see *Townsend* v. *Burke*, 334 U.S. 736, 740-41 (1948); *United States* v. *Needles*, 472 F.2d 652, 658-59 (2d Cir. 1972); nor does he present evidence that Judge Platt's sentence was based upon anything other than consideration of appellant's "past life, health, habits, conduct and mental and moral propensities," *Williams* v. *New York*, 337 U.S. 241, 245 (1949). Rather, appellant rests upon an emotional plea for leniency.

The dispositive principle here is that a "sentencing judge has very broad discretion in imposing any sentence within the statutory limits. . . ." *United States* v. *Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972), "[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end" *Dorszynski* v. *United States*, 418, U.S. 424, 431 (1974); *Gore* v. *United States*, 357 U.S. 386, 393 (1958). The maximum sentence provided for violations of Title 8, United States Code, Section 1324 is a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien habored. Since Rodriguez' sentence of four years imprisonment per count, to run concurrently, is well within the statutory maximum, further appellate review is improper.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
Assistant United States Attorney,
Of Counsel.

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 7th day of November 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Anthony Correri, Esq.
50 Mineola Boulevard
Mineola, New York 11501

Sworn to before me this
7th day of November, 1975

Olga I. Morgan

OLGA I. MORGAN
Notary Public, State of New York
No. 24-4501986
Qualified in Kings County
Commission Expires March 30, 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

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